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IN THE

# Supreme Court of the United States

AT&T CORP. AND
MCI WORLDCOM NETWORK SERVICES, INC.,

*Petitioners,*

v.

CINCINNATI BELL TELEPHONE COMPANY, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR THE STATES AND CONSUMER COUNSEL IN OPPOSITION

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## QUESTION PRESENTED

Whether the Fifth Circuit correctly concluded that the FCC exceeded its authority by requiring carriers that provide *intra*state services to fund a federal program designed principally to support interstate access service to the Internet by schools, libraries and rural health care providers, in light of Section 254(d) of the Telecommunications Act of 1996, which expressly requires carriers that provide *inter*state services to contribute to federal universal service programs.

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## BRIEF FOR THE STATES AND CONSUMER COUNSEL IN OPPOSITION

The People of the State of California and the California Public Utilities Commission, the Texas Office of Public Utility Counsel, the Iowa Utilities Board, the Florida Public Service Commission, and the Louisiana Public Service Commission respectfully oppose the petition for a writ of certiorari.

## STATEMENT OF THE CASE

Under the Telecommunications Act of 1996 ("the 1996 Act" or "Act"),[1] Congress carefully preserved in Sections 254(d) and (f) the dual federal-state structure which had existed for over six decades governing the funding of federal and state universal service programs. In what the Federal Communications Commission (hereafter, "FCC" or "Commission") itself acknowledged as a "significant departure" from this historic dual regulatory regime, the FCC sought to blur the distinction between state and federal spheres by requiring carriers that provide *intra*-state services to contribute to a *federal* fund designed principally to support interstate access service to the Internet by schools, libraries and rural health care providers. The Fifth Circuit, relying on the plain text of Sections 254(d) and (f) of the 1996 Act, correctly held that Congress had not given this authority to the FCC. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). The court's holding is in full accordance with this Court's decision last term in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

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[1] Pub. Law No. 104-104, 110 Stat. 56 (1996).

Petitioners challenge this aspect of the court's decision based on gross distortions regarding the basis of the decision, and speculative claims regarding the effect of the decision on other provisions of Section 254. The challenge is without merit. Within the specific context of funding universal service programs, where carriers contribute on the basis of their service revenues, the court did nothing more than make the unremarkable finding that Section 254(d) plainly instructs carriers offering *inter*state services to contribute to federal programs based on the revenues from these services, while Section 254(f) plainly instructs carriers offering *intra*state services to contribute to state programs based on the revenues from those services. Contrary to petitioners' assertion, this funding mechanism is equitable, nondiscriminatory, and competitively neutral because, unlike before the enactment of the 1996 Act, Sections 254(d) and (f) require that *all* similarly-situated carriers contribute. The FCC has thus ordered not only interexchange carriers but also wireless, resale, and other carriers that offer interstate services to contribute to its federal programs. Moreover, by expanding the pool of contributors beyond interexchange carriers, Congress has also enabled the FCC to ensure adequately sized federal funds.

Nor does the court's decision have any adverse effect on the FCC's ability to preserve and advance universal service, as petitioners assert. Consistent with its mandate in Section 254(d), and without challenge by petitioners, the FCC has funded both its core program to support citizens residing in high-cost areas of the nation, and its program for low-income customers, based solely on assessing a carrier's revenues from interstate services.

Pet. App. 221a. And while in the wake of the court's decision, the FCC has adjusted the contribution base to include only interstate revenues to fund its program to support Internet access by schools, libraries and health care providers, that program remains fully viable.

In short, the Fifth Circuit's decision on the aspect challenged by petitioners is unexceptional: the decision gives ordinary meaning to the plain language of Section 254, it is consistent with this Court's decision in *Iowa*, and it permits effective implementation of federal and state universal service programs. Petitioners are left only with their claim that the decision is the "first judicial interpretation" of one of many provisions of the 1996 Act, but that claim does not warrant review and the expenditure of this Court's scarce resources.

**1. Universal Service Prior to the 1996 Act.** States have long assumed the central role in preserving and advancing universal service. For more than sixty years, individual states, like California, Texas and Iowa, have been primarily charged with ensuring that basic telephone service is available and affordable to all customers within the state. The affordability and availability of basic telephone service is known as "universal service."

Congress also carved out a complementary role for the federal government. Under Section 1 of the Communications Act of 1934 ("1934 Act"), 47 U.S.C. § 151,[2]

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[2] Unless otherwise stated, statutory references are to the 1934 Act, as amended by the 1996 Act. For the Court's convenience, relevant statutory provisions are reproduced in the appendix to this opposition brief.

Congress created the FCC, whose purpose, among other things, is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."

At the same time, Congress provided in Section 2(b) that, with stated exceptions, "nothing in this subchapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b) (as amended). Congress thus expressly "fenced off [these areas] from FCC reach or regulation." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986).

To coordinate the dual but complementary role of the FCC and the states over "common carrier communications of joint Federal-State concern," including the furtherance of universal service, Congress enacted Section 410(c). 47 U.S.C. § 410(c). Section 410(c) gives the FCC authority to convene a joint board, composed of federal and state regulators, to determine how best to advance universal service goals.

Prior to 1996, when only one local exchange carrier was authorized to provide telephone service within its franchise area, states fostered universal service principally through implicit rate subsidies. Typically, this meant that urban customers paid higher rates to enable rural customers to pay lower rates, even though it cost

less to serve the former customers. In addition to the use of implicit subsidies, states, like California and Texas, established explicit funds to support universal service in high cost and rural areas within their boundaries. In California, these state funds are supported by assessing a percentage charge against end user billings for intrastate communications services. California does not assess revenues from a carriers' interstate services.[3]

For its part, the FCC subsidized high cost and rural areas of the country by assessing a portion of a carrier's interstate revenues from interstate services and allocating these funds to other carriers eligible to receive universal service support which serve those areas. The FCC also subsidized universal service through interstate access charges. In funding these federal subsidy programs, the FCC did not assess carriers' revenues from intrastate services.[4]

**2. The 1996 Act**. Congress enacted the Telecommunications Act of 1996 in order to open local telephone markets to competition. With the emergence of competition, the system of implicit subsidies to ensure the preservation and advancement of universal service could no

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[3] Carriers typically offer a mix of interstate and intrastate services in varying proportions. For example, a local exchange carrier, which primarily provides intrastate services, also provides interstate access service, which enables a long distance carrier to begin and terminate long distance calls on the local network. For example, access to the Internet via the local network is considered an interstate access service by the FCC.

[4] Some interstate carriers are authorized to provide intrastate toll service, but the revenue from this service is not assessed by the FCC for federal programs.

longer be sustained.[5] Cognizant of that fact, and reaffirming the 1934 Act's purpose to preserve and advance universal service, Congress provided in the 1996 Act that universal service support should be explicit, not implicit, 47 U.S.C. § 254(e), and implemented through "specific, predictable and sufficient Federal and State mechanisms" in lieu of the old implicit subsidy system. 47 U.S.C. § 254(b)(5).

To ensure fairness and competitive neutrality, Congress further mandated that "[e]very telecommunications carrier" contribute to the preservation and advancement of universal service. 47 U.S.C. §§ 254(d) & (f). Prior to the Act, interexchange carriers largely supported federal universal service programs. By expanding the pool of contributors to federal as well as state funding mechanisms, Congress sought not only to ease the burden on interexchange carriers, but also to ensure that programs would be adequately sized. At the same time, Congress maintained the express division of authority for funding federal and state programs, as had existed under the 1934 Act. Under Section 254(d), Congress provided that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to the

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[5] An incumbent carrier that charges above-cost rates to urban customers in order to subsidize rural customers would be vulnerable to a competitor that offers low-cost rates to those same urban customers, and chooses not to serve rural customers. In that circumstance, the incumbent carrier would be forced to lower its above-cost rates to its urban customers, but in doing so, would jeopardize the additional revenue that it generated from those rates to subsidize rural customers. Pet. App. 9a.

"mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). In contrast, under Section 254(f), Congress declared that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute . . . in a manner determined by the State to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f).[6] Under this dual regulatory scheme, carriers which offer interstate services contribute only to federal universal service funds, and carriers which offer intrastate services contribute only to state universal service funds. Carriers that offer both interstate and intrastate services would contribute proportionately to both funds, as they did prior to the 1996 Act.

Maintaining the dual but divided structure, in Section 254(k) Congress further charged the "Commission, with respect to interstate services, and the States, with respect to intrastate services," with ensuring through cost allocation and accounting rules that universal services bear no more than a reasonable share of the joint and common costs of telephone facilities used to provide those services. 47 U.S.C. § 254(k). Section 254(k) is in accord with *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133. 148 (1930), which requires that the costs of facilities

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[6] Congress also permitted the states to adopt regulations providing for additional definitions and standards to preserve and advance universal service within the individual state so long as such regulations do not rely on or burden federal universal service support mechanisms. 47 U.S.C. § 254(f).

used for both interstate and intrastate services be separated and assigned to federal and state jurisdictions for recovery in interstate or intrastate rates.

Congress continued the parallel federal-state regulatory structure in Section 254(h), which provides for discounted services to schools, libraries and rural health care providers supported by universal service funding. 47 U.S.C. § 254(h). In Section 254(h)(1)(B), Congress specified that "[t]he discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by [eligible schools and libraries]." 47 U.S.C. § 254(h)(1)(B).[7]

Finally, in Section 601(c)(1), Congress adopted a rule of statutory construction, specifying that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Telecommunications Act of 1996, § 601(c)(1) (not codified).

**3. The FCC's Universal Service Order.** After considering recommendations from the Federal-State Joint Board, the FCC issued an order implementing Section 254. *Report and Order, In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997)

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[7] In Section 214(e)(3), Congress further provided that in areas not served by a carrier, the "Commission, with respect to interstate services, or a State commission, with respect to intrastate services," shall determine which carrier is best able to serve. 47 U.S.C. § 214(e)(3).

("*Order*"). Among other things, the FCC defined a set of services eligible for universal service support; proposed federal mechanisms for funding universal service support to high-cost areas, low-income customers, and to schools, libraries and rural health care providers; expanded the base of contributors to federal support mechanisms to include wireless, resale and other carriers; and established a timetable for implementing its mechanisms.

With respect to supporting universal service in high-cost areas, the FCC adopted an explicit funding mechanism. Under this new mechanism, consistent with long-standing funding practices, the FCC determined a carrier's contribution by assessing, or charging, a percentage of the carrier's revenues from its interstate services. Pet. App. 226a, ¶ 831. The FCC did not assess the revenues from the carrier's intrastate services. As the FCC explained, funding on this basis would "maintain historic jurisdictional lines." Pet. App. 158a, ¶ 40. The FCC also determined the amount of contribution by carriers to the low-income assistance program based solely on their interstate revenues. Pet. App. 221a, ¶ 824. None of the petitioners challenged the FCC's decision to exclude intrastate revenues from the assessment base for calculating carrier contributions to the federal high-cost fund or the fund for low-income customers.

For schools and libraries, the FCC implemented a new support program that, consistent with congressional intent, was primarily designed to subsidize access to advanced telecommunications and information services, and more particularly, access to the Internet. *Order*, ¶ 429 (identifying "cost [as] a significant barrier to classrooms

having access to the Internet") and ¶ 442 (citing congressional intent that classrooms and libraries should have access links to educational materials, research, government services, reports and information services "which can be carried over the Internet.") The FCC has recently declared that access to the Internet is primarily an interstate service, even though access to an Internet Service Provider is via a local call. *Declaratory Ruling, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3697, 3701-3702, ¶¶ 12, 18 (1999), *appeal pending, Bell Atlantic Telephone Cos. v. FCC*, Nos. 99-1094, *et al.* (D.C. Circuit). For rural health care providers, the FCC also provided for universal service support for limited toll-free access to the Internet. Pet. App. 156a, ¶ 36.

The FCC, however, departed from its historic practice of funding federal universal service programs based solely on assessing a carrier's revenues from its interstate services. Instead, the FCC broadened the contribution base for the schools, libraries and health care fund to include an assessment of a carrier's revenues from its intrastate services. The FCC acknowledged that this contribution base represented a "significant departure from the current method of funding existing universal service mechanisms." Pet. App. 215a, ¶ 818.[8] This "significant departure" was legally permissible, the FCC reasoned,

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[8] Two of the four state commission members of the Federal-State Joint Board objected to the inclusion of intrastate revenues in calculating a carrier's contribution to the federal program for schools and libraries. Pet. App. 227a.

because the FCC was not regulating the intrastate charges of a carrier, which the FCC admitted it could not do in light of Section 2(b), but "merely is calculating a federal charge" to support services to eligible schools, libraries and rural health care providers. Pet. App. 218a, ¶ 821.[9] By the same reasoning, the FCC also claimed "authority to refer carriers to the states to seek authority to recover a portion of their intrastate contribution from intrastate rates." Pet. App. 215a, ¶ 818. The FCC, however, declined to immediately exercise such authority.

**4. The Decision Below.** The court of appeals reversed that aspect of the FCC's order that mandated the inclusion of intrastate revenues from intrastate services in the calculation of carriers' contributions to federal universal service programs. Stating that "[t]here is no question that the amount of a carrier's universal service contributions will increase with the inclusion of intrastate revenues," Pet. App. 109a n.101, the court concluded that the assessment of a carrier's intrastate revenues constituted a " 'charge in connection with intrastate service.' " Pet. App. 109a n.101. The court thus held that the FCC had run afoul of Section 2(b) of the 1934 Act, which expressly prohibits the FCC from imposing intrastate charges. Pet. App. 109a.

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[9] The FCC took the exact opposite view in *AT&T Communications of the Mountain States, Inc. v. Public Service Commission*, 625 F.Supp. 1204 (D.Wyo. 1985), where it challenged a state's authority to calculate an intrastate rate based on both the interstate and intrastate revenues of AT&T. The court agreed with the FCC (and AT&T) that the state had regulated an interstate service, and hence had exceeded its authority.

The court further held, consistent with this Court's decisions in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) and *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 377 (1986), that the FCC failed to show that Section 254 applies to contributions by intrastate carriers to federal universal service programs in an unambiguous and straightforward manner so as to override the command of Section 2(b). Pet. App. 53a. To the contrary, the court found

> "substantial support in the statute for a dual regulatory structure in the administration of the universal service program. Section 254(d) specifically instructs interstate carriers to contribute to the FCC's universal service mechanisms, while § 254(f) instructs intrastate carriers to contribute to the states' individual universal service mechanisms. This section contains the only discussion of intrastate universal service mechanisms and directs intrastate carriers to report to the states rather than to the FCC."

Pet. App. 53a.

The Fifth Circuit further explained that, in contrast to *Iowa*, where this Court found that Sections 251 and 252 were solely concerned with intrastate issues, "§ 254 applies to both interstate and intrastate services. It does so, however, only to the extent that it gives exclusive authority over intrastate contributions to the state commissions." Pet. App. 53a.[10] The court thus concluded that

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[10] In *Iowa*, there was no dispute that Congress had taken the regulation of local telecommunications competition away from the States. *Id.*, 525 U.S. at 378-379 n.6. Here, Congress preserved the dual regulatory structure over universal service. Pet. App. 53a.

it was "incongruous to use this explicit limitation on FCC authority as the hook to provide it with jurisdiction." Pet. App. 53a.

Absent an unambiguous grant of jurisdiction to the FCC in Section 254, the court then applied Section 2(b). Understanding that "§ 2(b) serve[s] as both a rule of statutory construction in considering whether a provision applies to intrastate matters and as a jurisdictional fence against assertions of the FCC's ancillary jurisdiction," Pet. App. 108a, the Fifth Circuit made two rulings. First, "the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a 'charge . . . in connection with intrastate communication service' " under Section 2(b). Pet. App. 108a. As the court explained, "[i]f the point of § 2(b) was to protect state authority over intrastate service, allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide. This federal influence over intrastate services is precisely the type of intervention that § 2(b) is designed to prevent." Pet. App. 109a n.101. Second, the court ruled that Section 2(b) barred the FCC from asserting its ancillary jurisdiction over an intrastate matter solely to further the interstate goal of universal service. Pet. App. 110a. The court went on to hold that its jurisdictional decision applies with equal force to the FCC's assertion of authority to refer carriers to the states to seek recovery of their intrastate contribution in intrastate rates, and reversed that portion of the FCC's order as well. Pet. 111a.

The court of appeal denied rehearing en banc. This petition for certiorari follows.

## REASONS FOR DENYING THE PETITION

None of the reasons given by petitioners warrants review by this Court. Contrary to petitioners' hyperbolic speculation that the Fifth Circuit's construction of Section 254 of the Act threatens to undermine federal universal service programs, there is no threat whatsoever to these programs. Consistent with its statutory mandate and longstanding practice, the FCC has continued to respect jurisdictional boundaries in funding both of its traditional universal service programs – the high-cost fund to ensure affordable access to services by citizens residing in high-cost areas of the nation, and the low-income assistance program – based solely on assessing the revenues from a carrier's interstate services. These programs are utterly unaffected by the Fifth Circuit's decision. Likewise, there has been no adverse effect on the continued viability of the federal program for schools, libraries, and rural health care providers that primarily supports access to the Internet, even though the assessment base for funding this program has been adjusted in the wake of the court's decision.

The Fifth Circuit's decision does not begin to have the impact which petitioners ascribe to it. Consistent with the plain language, structure and legislative history of Section 254, the court of appeal held only that Sections 254(d) and 254(f) maintain the dual regulatory scheme governing the funding of federal and state universal service programs that existed before the 1996 Act. Under the revenue-based funding method adopted by the FCC, Section 254(d) directs carriers offering *inter*state services to contribute to federal programs based on the revenues from these services, while Section 254(f) directs carriers

offering *intra*state services to contribute to state programs based on the revenues from those services. It was in that specific context that the court held that Section 254 did not unambiguously apply to intrastate service, and that Section 2(b) did. That holding is unexceptional and fully consistent with this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Nor is there any merit to the claim that the Fifth Circuit's decision undermines the Act's requirement that funding mechanisms be equitable, nondiscriminatory, and competitively neutral. As discussed, the federal high-cost fund relies solely on contributions by carriers based on the revenues from their interstate services, yet petitioners have never challenged this funding mechanism as violative of the Act's requirements. Nor is it. To the contrary, the Act's requirement that funding be equitable, nondiscriminatory, and competitively neutral is satisfied by the Act's other requirement that *all* telecommunications carriers similarly situated contribute either to federal or state funding mechanisms. 47 U.S.C. §§ 254(d) & (f). Moreover, by expanding the pool of carriers responsible for contributing to federal universal service mechanisms (*e.g.*, wireless and resale carriers), the Act enables the FCC to ensure adequate funding.

Finally, it is not the Fifth Circuit's construction of Section 254 but the petitioners' overblown construction that threatens to undermine the ability of the states to preserve and advance universal service. By claiming, as petitioners do, that the FCC is free under Section 254 to assess a carrier's revenues from intrastate services for federal programs, petitioners implicitly suggest that the FCC could require the recoupment of this assessment in

intrastate rates. Such a result would be clearly overreaching, and the Fifth Circuit so found, as it would force states to raise intrastate rates to local residential customers – the very antithesis of universal service policy.

In sum, the Fifth Circuit's decision raises no significant legal issue, conflicts with no decisions of this Court, and does not adversely affect the implementation of the 1996 Act. Further review is not warranted.

## I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF SECTION 254

The Fifth Circuit's decision may well be the first judicial interpretation of Section 254, but that fact alone does not warrant review where, as here, the decision comports with the text, structure and history of Section 254. Indeed, petitioners have it exactly backwards in claiming that the FCC, and not the states, have primary responsibility for ensuring the availability and affordability of local, intrastate service. In the 1996 Act, Congress intended that "*States* shall *continue* to have the *primary* role in implementing universal service for *intrastate* services." H.R. Conf. Rep. No. 104-458, at 128 (1996) (emphasis added). Congress did not change the division of authority between the FCC and the states over universal service, but made clear that "[s]tate authority with respect to universal service is specifically preserved under new Section 254(f)." H.R. Conf. Rep. No. 104-458, at 132.

In four separate provisions of Section 254, which petitioners cite selectively or ignore, Congress could scarcely have been clearer in its intent to continue to

divide authority over the contributions, discounts, and costs for universal service between the FCC and the states. As the Fifth Circuit correctly found, in Sections 254(d) and (f) Congress expressly distinguished between carriers providing "interstate services," which generate interstate revenues, and carriers providing "intrastate services," which generate intrastate revenues, in determining who must contribute to federal and state universal service programs, respectively. Pet. App. 53a.

Similarly, in Section 254(h), Congress directed that the "*Commission*, with respect to *interstate* services, and the *States*, with respect to *intrastate* services" shall determine the level of discount to schools and libraries for access to services supported by universal service funding. 47 U.S.C. § 254(h)(1)(B) (emphasis added).[11] In Section 254(k), Congress maintained the jurisdictional division of "property, revenues, and expenses" discussed by this Court in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930) by specifying that the "*Commission*, with respect to *interstate* services, and the *States*, with respect to *intrastate* services," shall ensure that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 47 U.S.C. § 254(k) (emphasis added).

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[11] Congress further specified that a carrier providing such discounts shall be entitled to "an offset to its obligation to contribute to the mechanisms [*i.e.*, federal or state] to preserve and advance universal service," 47 U.S.C. § 254(h)(1)(B)(i), or reimbursement "utilizing the support mechanisms [*i.e.*, federal or state] to preserve and advance universal service." 47 U.S.C. § 254(h)(1)(B)(ii).

Far from blurring the distinction between interstate and intrastate services for universal service purposes, as the FCC maintained, Congress carefully preserved it. Such distinction would have been utterly meaningless if, as petitioners claim, Congress intended to permit the FCC to tap the revenues from intrastate services for its federal programs.

Moreover, to say, as petitioners assert, that "the FCC . . . has unambiguous statutory authority to adopt rules implementing *every* aspect of Section 254, whether it touches on intrastate or interstate matters" (emphasis added), is to flatly contradict the plain language in Sections 254(d),(f), (h), & (k). Pet. 16. While it is true that FCC jurisdiction follows where the 1996 Act applies to intrastate matters, it is equally true that FCC jurisdiction is limited where the 1996 Act expressly so states. As the Fifth Circuit succinctly stated: "We find it incongruous to use [an] explicit limitation on FCC authority as the hook to provide it with jurisdiction." Pet. App. 53a.

## II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *IOWA*

The Fifth Circuit's decision is in complete harmony with this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Petitioners nevertheless attempt to create a conflict between the two where none exists. In *Iowa*, this Court rejected jurisdictional challenges to an assertion of federal authority to implement Sections 251 and 252 of the Act governing the pricing of interconnection to the telecommunications network. In

that case, there was no question that, under Sections 251 and 252, Congress took away authority that had otherwise been reserved to the states. *Id.*, 525 U.S. at 378-379 n.6. Similarly, there was no question that the language of Sections 251 and 252 applied solely to intrastate interconnection arrangements. *Id.* at 371-372. In addition, neither Sections 251 nor 252 contained language which limited the scope of federal authority. Having found that Sections 251 and 252 unambiguously applied to the intrastate matters discussed therein, this Court held that Section 2(b), otherwise fencing off intrastate matters from FCC reach or regulation, did not apply. This Court, however, affirmed its holding in *Louisiana* that Section 2(b) does bar the FCC from using its plenary powers to assert ancillary authority over intrastate matters to which the 1996 Act does not apply solely to further an interstate goal. *Iowa*, 525 U.S. at 381 (*citing Louisiana*, 476 U.S. at 374).

By contrast, in Section 254, Congress made clear that "[s]tate authority with respect to universal service is specifically preserved," H.R. Conf. Rep. No. 104-458, at 132, and not supplanted. In that section, Congress carefully delineated the FCC's authority to (1) define, upon recommendation of the Federal-State Joint Board, which services would be entitled to support from federal universal service mechanisms (Section 254(c)); (2) adopt specific, predictable and sufficient federal mechanisms based on contributions from interstate carriers (Section 254(d)); and (3) require all carriers providing interstate services, unless exempted, to contribute to federal mechanisms (Section 254(d)). In parallel, Congress provided under Section 254(f) that the state may adopt additional definitions and regulations governing universal service;

adopt state universal service funding mechanisms based on contributions from carriers' intrastate services; and require all carriers offering intrastate services to contribute to state funding mechanisms.

The Fifth Circuit thus correctly recognized that "[u]nlike §§ 251 and 252, which were solely concerned with intrastate issues (i.e., interconnection of new entrants into the local telephone market), § 254 applies to both interstate and intrastate services." Pet. App. 53a. Significantly, however, "[i]t does so . . . only to the extent that it gives exclusive authority over intrastate contributions to the state commissions." Pet. App. 53a. The court explained that ["s]ection 254(d) specifically instructs interstate carriers to contribute to the FCC's universal mechanisms, while § 254(f) instructs intrastate carriers to contribute to the states' individual universal service mechanisms." Pet. App. 53a. In light of these express limitations, the Fifth Circuit properly concluded that Section 254 does not unambiguously apply to the funding of federal universal service programs based on revenues from a carrier's intrastate services. Consistent with the specific rule of statutory construction contained in Section 601(c)(1) of the 1996 Act, the court then correctly applied Section 2(b) as defined by this Court in *Iowa* and *Louisiana*.

Petitioners' claim that *Iowa* permits the FCC to use its rulemaking authority in Section 201(b) to "adopt rules implementing every aspect of Section 254, whether it touches on intrastate or interstate matters" is extravagant. Pet. 16. Section 201(b) states that the FCC may adopt rules "to carry out the provisions of this Act." 47 U.S.C. § 201(b). The "provisions of this Act," however,

include Sections 254(d), (f), (h) and (k), which expressly limit the FCC's reach to interstate services only. By comparison, no similar express language limiting federal authority appears in Section 251. Section 201(b) cannot plausibly be read to trump the plain limitation on federal authority contained in Section 254(d) without impermissibly reducing the limiting language to mere surplusage. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

Nor is there any merit to petitioners' claim that an assessment on intrastate revenues is not a "charge" within the meaning of Section 2(b). [12] The prohibitions in Section 2(b), however, go beyond intrastate charges. The Fifth Circuit thus properly put petitioners' argument to rest when it explained that an assessment on intrastate revenues would unlawfully "affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide" – which is "precisely the type of intervention that § 2(b) is designed to prevent." Pet. App. 109a n.101.

In the end, it is the petitioners' construction of Section 254, not that of the Fifth Circuit, which represents a "stark departure" from its text, structure, and legislative history. Under their exorbitant reading of *Iowa*, "every aspect of Section 254" would be subject to FCC authority.

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[12] AT&T, however, objected when a state set an intrastate rate based on AT&T's total revenues, claiming that the state had regulated charges for interstate service. *See* n.9, *supra*.

Pet. 16. This would mean that nothing would preclude the FCC from adopting rules dictating the level of intrastate rates in the name of "ensur[ing] that universal service is available at rates that are just, reasonable, and affordable." 47 U.S.C. § 254(i). A greater intrusion on core state responsibilities which Congress intended to fence off from FCC reach under Section 2(b) could hardly be imagined.

## III. THE FIFTH CIRCUIT'S DECISION DOES NOT ADVERSELY AFFECT THE IMPLEMENTATION OF SECTION 254 OF THE ACT

The Fifth Circuit's decision permits effective federal administration and enforcement of Section 254, notwithstanding petitioners' forecast of dire consequences allegedly stemming from the decision. For example, petitioners claim that the court's holdings "*suggest* that the FCC *may* have no rulemaking authority to implement or enforce" Section 254, or that the FCC may be unable to ensure that federal support is targeted for universal service purposes. Pet. 20-21. This and other predictions not only are purely speculative, but they are so extreme as to be nonsensical. This Court should not, and need not, review this decision on so slender a basis.

Nor is there any basis to petitioners' claim that the Fifth Circuit's decision is unfair. The court did no more than construe Section 254 to require carriers which provide interstate services to fund a federal universal service program that in large part supports certain interstate access services – *i.e.*, connections to the Internet by schools and libraries. There is nothing inequitable and

discriminatory about this result. Indeed, in funding the federal high-cost program, and the low-income assistance program, petitioners never challenged the FCC's decision to limit contributions based on the interstate revenues of carriers. For a funding mechanism to be nondiscriminatory and competitively neutral, Section 254(d) requires only that *all* telecommunications providers that provide interstate services shall contribute to such mechanism, not principally interexchange carriers, as previously was the case. And by expanding the set of providers required to contribute, Congress not only enabled the FCC to reduce the burden on interexchange carriers, but also to ensure that federal programs would be adequately sized.

Petitioners' claims that the Fifth Circuit's decision "may" affect the FCC's administration or enforcement of other provisions of Section 254 are likewise frivolous. Federal action which simply takes into account or considers the impact of federal programs on state universal service mechanisms is a far cry from federal action which imposes a charge on intrastate services for the purpose of funding federal programs.[13] It is only the latter action which the Fifth Circuit properly held had impermissibly intruded on states' authority under Section 2(b) and was not otherwise permitted under Section 254(d).

Finally, petitioners' attempt to portray themselves as the guardians of state interests is disingenuous. Their claim that Section 254 gives the FCC authority over every aspect of universal service would mean that the FCC

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[13] Even if the federally-imposed charge is not recovered from intrastate customers, it is still a charge on intrastate services, and squarely prohibited by Section 2(b).

could ultimately dictate the scope and size of *state* universal service programs. Such a construction of Section 254 would directly encroach upon state authority, and the Fifth Circuit so found.

In sum, the Fifth Circuit's decision does no more than effectuate congressional intent in Sections 254(d) and (f) to maintain the dual regulatory structure for funding federal and state universal service support mechanisms. It does so in accordance with the plain language, structure and legislative history of Section 254, and in harmony with this Court's decisions in *Iowa* and *Louisiana*. The Fifth Circuit's decision was correct. No further review is warranted.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# STATUTORY APPENDIX

**47 U.S.C. § 152(b)(1)**

**(b)(1) Exceptions to Federal Communications Commission Jurisdiction**

Except as provided in sections 223 and 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

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**47 U.S.C. § 214(e)(3)**

**(e) Provision of Universal Service**

**(3) Designation of Eligible Telecommunications Carriers for Unserved Areas**

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet

the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

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**47 U.S.C. § 254 Universal Service**

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**(d) Telecommunications Carrier Contribution**

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

* * *

**(f) State Authority**

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A

State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

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**(h) Telecommunications Services For Certain Providers**

**(1) In General**

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**(B) Educational Providers and Libraries**

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

**(k) Subsidy of Competitive Services Prohibited**

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

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## TITLE VI – EFFECT ON OTHER LAWS

**§ 601(c)(1), Telecommunications Act of 1996, Pub.L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996)**

(c) Federal, State, and Local Law

(1) No Implied Effect

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

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